## APPENDIX A

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

KENNETH B. ZAMVIL,

Plaintiff and Appellant,

v.

PETALUMA JOINT UNION HIGH SCHOOL DISTRICT et al.,

Defendants and Respondents.
_____/

A081951

(Sonoma County Super. Ct. No. 208215)

Appellant Kenneth B. Zamvil appeals from the judgment in favor of respondents Petaluma Joint Union High School District (District) and its superintendent, Charles Cadman, on his action for rescission of contract and other relief. We affirm the judgment.

## I. BACKGROUND

After 19 years of service as a science teacher at Casa Grande High School in respondent District, on March 2, 1992, the board of education suspended Zamvil pending final disposition of numerous charges of misconduct. The charges included allegations of multiple occasions of (1) saying or doing things that were offensive to female students; (2) taking class time to discuss matters involving his personal life; (3) making inappropriate statements

to students that raised questions about the integrity of his grading system; (4) starting class late; and (5) touching or hitting students in inappropriate ways. The board issued amended charges – for a total of 61 allegations of misconduct – on February 23, 1993. James Bertoli represented Zamvil from approximately mid-March 1992 until October 25, 1993.[1] Thereafter the California Teachers Association (CTA) appointed Priscilla Winslow to represent him for the limited purpose of arguing for a continuance of the administrative hearing set for November 8. The motion to continue was heard on Wednesday, November 3. The administrative law judge denied a continuance.

After the hearing, Robert Henry, chief counsel for the District, disclosed to Winslow that the District had a potential new charge. Several days earlier, Jack Fitzgerald, the investigator retained by the District, reported that one of Zamvil's former students alleged that Zamvil had used drugs in his presence. A day or two later Henry had a further conversation with Winslow and faxed her corroboration in the form of declarations in a civil action that indicated Zamvil's drug usage. Apparently the student's information was 10 years old, but Henry was of the opinion that there was precedent to circumvent the 4-year statute of limitations for disciplinary actions against certificated teachers.

Settlement negotiations ensued. Zamvil had the assistance of Bertoli as well as Steve Gallenson during this process. Gallenson testified that he began acting as

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[1] All further dates are in the 1993 calendar year unless otherwise specified.

temporary counsel to Zamvil around October 28, in order to facilitate the settlement process. During this time frame Bertoli was also meeting with Zamvil and discussed settlement with Margaret Merchat, another attorney in the District's legal department. Merchat prepared the initial draft. Revisions were proposed, and made, to accommodate Zamvil with respect to the effective date of his resignation and the type of reference the District would give to prospective employers.

In order to cancel the administrative hearing set for Monday, November 8, the District required that the resignation agreement be executed by the close of business on Friday, November 5. The District was looking at calling approximately 30 witnesses in the event the hearing went forward. Zamvil, however, was out of town on a teaching assignment, so Attorney Gallenson signed the resignation agreement for him on Friday; Zamvil executed it in person on Saturday. The District in turn cancelled the proceeding.

Seven months later Zamvil filed his action for rescission of the resignation agreement on account of duress, undue influence and fraud. The trial court granted the District's motions to exclude evidence that the school board meetings leading up to the misconduct charges, as well as the ensuing investigation, were improper. Following a six-day bench trial, the court entered judgment denying Zamvil any relief. Likewise, the court denied Zamvil's motion for new trial. This appeal followed.

## II. DISCUSSION

### *A. Law of Rescission*

Civil Code[2] section 1689 sets forth grounds for unilateral rescission. These include cases where "the consent of the party rescinding . . . was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds. . . . " (*Id.* at subd. (b)(1).) And even where a transaction is free from fraud, duress or undue influence, a contract can be rescinded "[i]f the public interest will be prejudiced by permitting" it to stand. (*Id.* at subd. (b)(6); *Grimes v. Allen* (1949) 93 Cal.App.2d 653, 656.)

Duress consists of unlawful or fraudulently obtained confinement of a person, his or her relatives or property which causes the person to consent to a transaction out of fear. (See § 1569; *Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 128.) The related doctrine of economic duress has been recognized as a basis for rescinding a settlement agreement. However, in light of the notions of protecting the freedom of contract and according finality to private dispute resolutions, courts are reluctant to set aside settlements. Thus, they apply the economic duress doctrine in limited circumstances, as a " 'last resort.' " (*San Diego Hospice v. County of San Diego* (1995) 31 Cal.App.4th 1048, 1058.) The doctrine comes "into play upon the doing of a wrongful act which is sufficiently coercive to cause a reasonably prudent person

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[2] All further statutory references are to the Civil Code unless otherwise specified.

faced with no reasonable alternative to succumb to the perpetrator's pressure." (*Rich & Whillock, Inc. v. Ashton Development, Inc.* (1984) 157 Cal.App.3d 1154, 1158.) Economic duress as a ground for rescinding a contract is thus a tool to correct "the wrongful exploitation of business exigencies to obtain disproportionate exchanges of value." (*Id.* at p. 1159.)

By definition undue influence includes "taking an unfair advantage of another's weakness of mind" (1575, subd. 2) or "taking a grossly oppressive and unfair advantage of another's necessities or distress" (*id.* at subd. 3). Factors to be considered in determining whether there was "undue influence" include " 'the unfairness of the resulting bargain, the unavailability of independent advice, and the susceptibility of the person persuaded.' " (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 423, p. 380, quoting Rest.2d Contracts, § 177, com. b.)

Actual fraud involves conscious misrepresentation, concealment or false promises which induces another to enter a contract. (1572; *Odorizzi v. Bloomfield School Dist., supra,* 246 Cal.App.2d at p. 128.) Constructive fraud " 'comprises all acts, omissions and concealments involving breach of legal or equitable duty, trust, or confidence, and resulting in damages to another.' " (*Barrett v. Bank of America* (1986) 183 Cal.App.3d 1362, 1368-1369.)

*B. Scope of Relevant Evidence*

Zamvil has outlined a list of 17 purported instances of "egregious conduct" by the District in hearing initial allegations of misconduct from parents, conducting related actions leading up to his discharge and initiating

and carrying out the underlying investigation. These run the gamut from drumming up complaints, falsifying records, concealing information and committing perjury to breaching the collective bargaining agreement to violating the Education Code, the Brown Act, and board policies and bylaws.

Zamvil contends the trial court erred in ruling that evidence relating to this alleged misconduct was irrelevant to his rescission action. He argues, for example, that the November 1993 resignation agreement "was inextricably tied" to the District's behavior which he variously describes as amounting to economic duress, undue influence, constructive fraud and a violation of public policy. "**Had the District followed the law,**" he argues in his opening brief, "**there would not be a resignation and release.**" (Original bold-faced type.) The ruling was proper.

With these and similar statements, Zamvil consistently has tried to connect the events and processes leading up to the filing of charges – including the District's basis and preparation of the misconduct charges – with the execution of the resignation agreement itself. The problem with this analysis is that duress, undue influence and fraud all go to whether or not Zamvil freely consented *to the agreement*.

To begin with, the investigation process and what it revealed as well as the District, practices, actions and procedures in hearing the initial complaints and developing the statement of charges were too remote in time to impact Zamvil's consent to the resignation agreement. More than 18 months had elapsed from the initial filing

against Zamvil and the settlement. The District's conduct occurring up to initiation of the administrative proceeding was highly pertinent to the outcome of *that* proceeding. Zamvil had plenty of time to investigate and take action within the administrative proceeding with respect to all the purported violations. Copies of interview transcripts from the interviews with parents and students that Fitzgerald elected to tape-record were given to Zamvil. His remedy was to challenge the District's procedures, actions and processes in the administrative proceeding. Having declined to do so, he has waived these objections. This includes the objection based on violation of public policy because again, that objection goes to events predating the settlement negotiations.

Similarly, the trial court properly excluded as irrelevant the testimony of James McGloin, retired principal of Casa Grande High School. McGloin retired in 1993 and was not involved with events surrounding the resignation agreement. McGloin, as site administrator, had evaluated Zamvil's teaching performance. And although his testimony might have been relevant at the administrative hearing on the validity of the charges against Zamvil, the trial court had it right in ruling that McGloin had nothing relevant to offer on "whether or not there was some [overreaching] or concealment at the time of the entry into the contract."

C. *Necessities and Distress*

Zamvil also complains that the trial court wrongfully prevented him from putting on proof of his necessity or

distress, a necessary element of a claim of undue influence pursuant to section 1575. According to Zamvil, the trial court erroneously excluded relevant evidence concerning "his *in pro per* status, his lack of informed and prepared counsel during settlement negotiations and, on the eve of a lengthy and complex administrative trial, his inability to find alleged drug witness Johnson, and his own distressed mental state." (Original italics.) The trial court's evidentiary decisions were sound.

*1. Representation During Settlement*

First, as to the status of Zamvil's representation during the settlement process, we note that the trial court was well aware of the situation, pointing out the following pertinent facts in its summary of facts: "Throughout the administrative proceeding, Plaintiff was represented by six attorneys, most specialists in teacher labor matters. (There was a period of about one week when the School District did not know whether Plaintiff was represented by counsel.) Plaintiff's principal attorney was Mr. Joseph Bertoli until October 25, 1993, when he withdrew from plaintiff's case. [¶] . . . (Plaintiff filed the motion [to continue] in *pro per*.)" (Original underscore.)

Second, although it appeared to the District that Zamvil was without representation during the period spanning October 25 – when Mr. Bertoli withdrew – and November 4, in fact both Bertoli and Gallenson consulted with Zamvil during the period leading up to the November 5 settlement agreement. Moreover, Gallenson testified that he commenced "temporary" representation of Zamvil on October 28 for purposes of facilitating execution of

the resignation agreement. Additionally, Winslow specially appeared to argue the motion to continue the administrative hearing. Finally, all of these lawyers were experienced in teacher labor relations matters.

Bertoli of course was amply informed about the case, having represented Zamvil since March 1992. Bertoli and Merchat, on behalf of the District, discussed settlement and touched on the "general terms of the settlement agreement." Merchat provided Bertoli with a draft of the settlement agreement on November 4; Bertoli met with Zamvil and his wife that evening about an ex parte matter. Merchat provided him with a draft of the settlement agreement and she made changes based on discussions with both Bertoli and Gallenson.

Gallenson first became aware of Zamvil's situation earlier in 1993 when Zamvil phoned him with several transcripts of student interviews. By November 5 he had examined the amended statement of charges, as well as some student interviews and a deposition. According to both Merchat and Henry, Gallenson seemed familiar with the case. Merchat had settlement discussions with Gallenson, confirmed in a faxed memorandum. Gallenson also had settlement conversations with chief counsel Henry, including a candid discussion about Henry's assessment of the strength of the case. As well, both Merchat and Henry discussed with Gallenson the issue of conveying information about the underlying charges to the California Commission on Teacher Credentialling (CCTC), notwithstanding Zamvil's resignation.

Gallenson also told Merchat he had authority to enter into a resignation agreement on behalf of Zamvil. He

faxed the agreement to Zamvil on the afternoon of November 4 and spoke with Zamvil "a number of times" during the week before they signed the agreement on November 5 (Gallenson) and November 6 (Zamvil). According to Zamvil's testimony, he did not claim that Gallenson inadequately advised him concerning the terms of the resignation agreement before Gallenson signed it on his behalf. Moreover, Gallenson testified to his own understanding of all aspects of the agreement.

In addition, although Winslow played a lesser role, she, too, was involved in settlement discussions. For example, Winslow discussed with Henry what type of recommendation the District would provide to prospective employers. As well, they covered the merits of the case from Henry's perspective, allegations of drug use by a former student and the issue of relaying information to the CCTC. Henry faxed to her several declarations filed in Zamvil's dissolution action that indicated drug use on his part.

Thus, contrary to Zamvil's assertions, the record demonstrates that Zamvil had the assistance of competent, informed counsel during the settlement process.

2. *Representation at the Administrative Hearing*

Zamvil argues nonetheless that his distress was compounded by the fact that he did not have an attorney to represent him in the upcoming administrative hearing, and the court did not allow Gallenson to testify that he had a calendar conflict. First the court cut-off this testimony on relevancy grounds because Gallenson had just

testified that he made a special appearance in the case. Second, when asked whether his representation in the administrative proceeding was conditioned on the administrative law judge granting a continuance, Gallenson asserted the attorney-client privilege. Then, after the court prodded him to just "[t]ell us what your relationship to the plaintiff was in this case," the question of a conditioned representation was reasserted and Gallenson gave a nonanswer. Third, Zamvil himself wrote to the administrative law judge on November 4 that he had Gallenson's tentative agreement to represent him at the administrative hearing. Zamvil testified that the tentative agreement was "[c]onditioned upon getting a continuance."

Further, Zamvil moved for a continuance in the administrative proceeding and in superior court; both motions were denied. The denials of continuance by the administrative law judge and the superior court[3] on November 3 and November 5 respectively are not a basis for rescission. As the trial court indicated, if Zamvil felt he could not go forward without a continuance, he should have sought a writ before November 8. Although it would have been tight, a writ petition could have been prepared in advance and filed immediately after the November 5 denial of continuance or stay. Zamvil had the assistance of counsel during this period. It was up to

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[3] Although we do not have copies of anything relating to the November 5 ex parte hearing in superior court, it appears from the briefs that the hearing was on a motion for either a continuance or a stay.

them to advise Zamvil of these procedures prior to signing the resignation agreement.

*3. Drug Use Allegations*

Zamvil further asserts that the court wrongfully precluded testimony about "one of the most distressing of circumstances. The Court would not let plaintiff testify that Johnson's name was given to him on November 3, 1993, as a witness who would come forth and testify that Zamvil used drugs with a student. . . . Nor was he allowed to testify that he had no means of finding Johnson." Contrary to his assertion, both Merchat and Zamvil testified to Zamvil's knowledge of Johnson as a potential witness on November 3. Additionally, as to the objection that the court impermissibly prevented Zamvil from testifying that he had no means of locating Johnson, Merchat testified that neither Bertoli nor Gallenson nor Zamvil ever requested the identity of the District's drug witness.[4] Moreover, Bertoli told Merchat *not* to obtain a statement from Johnson, the inference being that such information would have to be made available to the CCTC. Finally, Zamvil was permitted to testify that he had "[v]ery great concern" about introducing evidence at the administrative hearing related to alleged drug use. He explained that such evidence, true or false, would end up being very prejudicial and he would end up "losing the credential. . . . " He said when he heard about Johnson as a potential witness, he became upset, the news "set me into

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[4] Apparently Winslow asked Henry if he could identify the student by name, but Henry did not know the name at that time.

a panic . . . " He was frantic "[t]hat somebody could come up with this outrageous stuff." This development caused him to lose sleep.

Henry shared his thinking about the possibility of introducing the drug use information at trial with both Winslow and Gallenson, even though the allegations went to conduct occurring beyond the four-year statute of limitations. Henry indicated he was assessing whether to amend the statement of charges, pending further research and review of the information. The statement of charges was never amended. If Zamvil and the attorneys assisting him thought that a continuance was needed to conduct further discovery in light of the potential new witness, a continuance for good cause could have been sought in the administrative proceeding itself. (See Gov. Code § 11524.) No one sought a continuance on this basis and Zamvil cannot now complain about the timing of the dismissal hearing vis a vis learning of the potential student witness.

*D. Best Evidence*

Investigator Fitzgerald made notes of his interviews with ex-student Johnson. Johnson testified that Fitzgerald asked him to review those notes and sign a statement verifying their accuracy. Johnson wanted to make some changes to the notes and add a statement. Johnson testified that he asked Fitzgerald if he would leave the statement for him to review, and asked if he could modify it; Fitzgerald refused. To get rid of Fitzgerald, Johnson signed a statement verifying the accuracy of the notes on condition that Fitzgerald verify one point and revise a

section of the notes that Johnson thought posed a question, but did not include his response. The areas of inaccuracy had to do with Zamvil being at a party, and smoking cocaine or marijuana.

Counsel for Zamvil asked to have Fitzgerald's notes produced as the best evidence of their contents. The trial court denied the motion. Counsel renewed the request when the District asked Fitzgerald whether Johnson asked for certain changes to the notes before verifying their accuracy. Zamvil now charges that the trial court erred to his prejudice in failing to order the notes produced at trial. We disagree.

First, the best evidence rule (now the secondary evidence rule[5]) is only concerned with proof of the contents of a written document. (See Evid. Code § 1520 et seq. and former Evid. Code, §§ 1500-1511, repealed by Stats. 1998, ch. 100, § 1, operative Jan. 1, 1999.) For the most part, the District was not trying to prove the contents of Fitzgerald's notes with parol evidence. Rather, the District was trying to prove Johnson's statements and actions with respect to the notes as well as the fact that he executed the verification. The notes, after all, were purportedly notes of what Johnson said. Johnson, of course, can testify as to what he originally said to Fitzgerald, and to what he told Fitzgerald in terms of the inaccuracy of the notes.

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[5] See California Law Revision Commission Comment, West's Annotated Evidence Code sections 1500 to 1511 (2000 pocket supp.) page 35: "The Best Evidence Rule is repealed and replaced with the Secondary Evidence rule."

Second, to the extent the District did try to prove the contents of the notes[6], the failure to order them produced was not prejudicial. Zamvil contends that inspection of the notes would have helped answer these questions: (1) Did they contain initialing and dating by Johnson; (2) what do the notes indicated Johnson said Zamvil did on conjunction with drugs, if anything; (3) do the notes look more like questions than answers; and (4) do the notes impeach Fitzgerald's testimony about what Johnson told him?

To begin with, Johnson testified that he signed a statement saying the notes were accurate and initialed and dated each page of the notes. His testimony as to what he did is as good as the notes themselves. Next, Johnson testified that he verified the statement: " '[A]ctually saw him snorting cocaine and freebasing in front of students,' " but clarified that he told Fitzgerald "it looked like he had written down the question, not my response." From this the trial court found that Johnson verified that he told Fitzgerald "*that he* saw Mr. Zamvil snorting cocaine and freebasing cocaine with students in 1983." (Italics added.) While we agree that a perusal of the notes would have clarified their structure, i.e., whether some parts looked more like questions than answers, not having the notes was not prejudicial.

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[6] For example, counsel for the District did ask for confirmation of the contents of the notes when he asked Johnson: "And one of the statements in those notes that you verified is, 'actually saw him snorting cocaine and freebasing in front of students,' correct?"

Ultimately, Fitzgerald's notes could only be relevant to the issue of whether the District acted in bad faith in relying on Fitzgerald's findings to relay drug allegations to Zamvil's attorneys in order to intimidate him into resigning. Whether the notes were accurate or not, what is important is that Fitzgerald informed the District that he had identified a former student who had alleged Zamvil used drugs in his presence. The District corroborated the drug use allegations with three declarations from Zamvil's dissolution indicating his drug usage. Regardless of Fitzgerald's competency or integrity in interviewing Johnson and preserving his observations, there was no evidence indicating that the District would have a reason to doubt Fitzgerald's integrity or accuracy as an investigator.

We affirm the judgment.

## APPENDIX B

CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION FOUR

KENNETH B. ZAMVIL

v.

PETALUMA JOINT UINON HIGH SCHOOL DISTRICT, et al.
A081951

Sonoma County
Super. Ct. No. 208215

[FILED
Court of Appeal – First App. Dist.
FEB 16 2000
RON D. BARROW, CLERK
By _____
DEPUTY]

The petition for rehearing is denied.

Dated: FEB 16, 2000

HANLON, P.J.

## APPENDIX C

First Appellate District, Division Four, No. A081951
S086292

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

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KENNETH B. ZAMVIL,
Appellant

v.

PETALUMA JOINT UNION HIGH SCHOOL DISTRICT,
Et al., Respondents.

[SUPREME COURT
FILED
APR 19 2000
Frederick K. Ohlrich Clerk
DEPUTY]

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Appellant's petition for review DENIED.

GEORGE
Chief Justice

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## APPENDIX D

**California Civil Code § 1689**

(a) A contract may be rescinded if all the parties thereto consent.

(b) A party to a contract may rescind the contract in the following cases:

(1) If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party.

(2) If the consideration for the obligation of the rescinding party fails, in whole or in part, through the fault of the party as to whom he rescinds.

(3) If the consideration for the obligation of the rescinding party becomes entirely void from any cause.

(4) If the consideration for the obligation of the rescinding party, before it is rendered to him, fails in a material respect from any cause.

(5) If the contract is unlawful for causes which do not appear in its terms or conditions, and the parties are not equally at fault.

(6) If the public interest will be prejudiced by permitting the contract to stand.

(7) Under the circumstances provided for in Sections 39, 1533, 1566, 1785 [fn. omitted], 1789 [fn. omitted], 1930 and 2314 of this code, Section 2470 of the

Corporations Code [fn. omitted] Sections 331, 338, 359, 447, 1904 and 2030 of the Insurance Code or any other statute providing for rescission.

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**California Education Code § 44932.**

(a) No permanent employee shall be dismissed except for one or more of the following causes:

(1) Immoral or unprofessional conduct.

(2) Commission, aiding, or advocating the commission of acts of criminal syndicalism, as prohibited by Chapter 188 of the Statutes of 1919 [fn. omitted], or in any amendment thereof.

(3) Dishonesty.

(4) Unsatisfactory performance.

(5) Evident unfitness for service.

(6) Physical or mental condition unfitting him or her to instruct or associate with children.

(7) Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him or her.

(8) Conviction of a felony or of any crime involving moral turpitude.

(9) Violation of Section 51530 or conduct specified in Section 1028 of the Government Code, added by Chapter 1418 of the Statutes of 1947.

(10) Knowing membership by the employee in the Communist Party.

(11) Alcoholism or other drug abuse which makes the employee unfit to instruct or associate with children.

(b) The governing board of a school district may suspend without pay for a specific period of time on grounds of unprofessional conduct a permanent certificated employee or, in a school district with an average daily attendance of less than 250 pupils, a probationary employee, pursuant to the procedures specified in Sections 44933, 44934, 44935, 44936, 44937, 44943, and 44944. This authorization shall not apply to any school district which has adopted a collective bargaining agreement pursuant to subdivision (b) of Section 3543.2 of the Government Code.

* * *

**California Education Code § 44934.**

Upon the filing of written charges, duly signed and verified by the person filing them, with the governing board of the school district, or upon a written statement of charges formulated by the governing board, charging that there exists cause, as specified in Section 44932 or 44933, for the dismissal or suspension of a permanent employee of the district, *the governing board may, upon majority vote, except as provided in this article if it deems the action necessary, give notice to the permanent employee of its intention to dismiss or suspend him or her at the expiration of 30 days from the date of service of the notice, unless the*

*employee demands a hearing as provided in this article.* Suspension proceedings may be initiated pursuant to this section only if the governing board has not adopted a collective bargaining agreement pursuant to subdivision (b) of Section 3543.2 of the Government Code.

Any written statement of charges of unprofessional conduct or unsatisfactory performance shall specify instances of behavior and the acts or omissions constituting the charge to that the teacher will be able to prepare his or her defense. It shall, where applicable, state the statutes and rules which the teacher is alleged to have violated, but it shall also set forth the facts relevant to each occasion of alleged unprofessional conduct or unsatisfactory performance. . . . [Italics added.]

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**California Education Code § 44943.**

*When an employee* who has been served with notice pursuant to Section 44934 of the governing board's intention to dismisss or suspend him or her *demands a hearing, the governing board shall have the option either (1) to rescind its action, or (b) schedule a hearing on the matter.* [Italics added.]

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**California Education Code § 44944.**

**(a) In a dismissal or suspension proceeding initiated pursuant to Section 44934, if a hearing is requested by the employee, the hearing shall be commenced within 60 days from the date of the employee's demand for a**

hearing. The hearing shall be initiated, conducted, and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. However, the hearing date shall be established after consultation with the employee and the governing board, or their representatives, and the Commission on Professional Competence shall have all the power granted to an agency in that chapter, *except that the right of discovery of the parties shall not be limited to those matters set forth in Section 11507.6 of the Government Code but shall include the rights and duties of any party in a civil action brought in a superior court under Article 3* (commencing with Section 2016) of Chapter 3 of Title 4 of Part 4 of the Code of Civil Procedure. Notwithstanding any provision to the contrary, and except for the taking of oral depositions, no discovery shall occur later than 30 calendar days after the employee is served with a copy of the accusation pursuant to Section 11505 of the Government Code. In all cases, discovery shall be completed prior to seven calendar days before the date upon which the hearing commences. If any continuance is granted pursuant to Section 11524 of the Government Code, the time limitation for commencement of the hearing as provided in this subdivision shall be extended for a period of time equal to such continuance. However, the extension shall not include that period of time attributable to an unlawful refusal by either party to allow the discovery provided for in this section.

*If the right of discovery granted under the preceding paragraph is denied by either the employee or the governing board, all the remedies in Section 2034 of the Code of Civil Procedure shall be available to the party seeking discovery and*

*the court of proper jurisdiction, to entertain his or her motion, shall be the superior court of the county in which the hearing will be held.*

The time periods in this section and of Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and of Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4 of the Code of Civil Procedure shall not be applied so as to deny discovery in a hearing conducted pursuant to this section.

The superior court of the county in which the hearing will be held may, upon motion of the party seeking discovery, suspend the hearing so as to comply with the requirement of the preceding paragraph.

No witness shall be permitted to testify at the hearing except upon oath or affirmation. No testimony shall be given or evidence introduced relating to matters which occurred more than four years prior to the date of the filing of the notice. Evidence of records regularly kept by the governing board concerning the employee may be introduced, but no decision relating to the dismissal or suspension of any employee shall be made based upon charges or evidence of any nature relating to matters occurring more than four years prior to the filing of the notice.

(b) The hearing provided for in this section shall be conducted by a Commission on Professional Competence. One member of the commission shall be selected by the employee, one member shall be selected by the governing board, and one member shall be an administrative law judge of the Office of Administrative Hearings who shall

be chairperson and a voting member of the commission and shall be responsible for assuring that the legal rights of the parties are protected at the hearing. If either the governing board of the employee for any reason fails to select a commission member at least seven calendar days prior to the date of the hearing, the failure shall constitute a waiver of the right to selection, and the county board of education or its specific designee shall immediately make the selection. When the county board of education is also the governing board of the school district or has by statute been granted the powers of a governing board, the selection shall be made by the Superintendent of Public Instruction, who shall be reimbursed by the school district for all costs incident to the selection.

The member selected by the governing board and the member selected by the employee shall not be related to the employee and shall not be employees of the district initiating the dismissal or suspension and shall hold a currently valid credential and have at least five years' experience within the past 10 years in the discipline of the employee.

(c) The decision of the Commission on Professional Competence shall be made by a majority vote, and the commission shall prepare a written decision containing findings of fact, determinations of issues, and a disposition which shall be, solely:

(1) That the employee should be dismissed.

(2) That the employee should be suspended for a specific period of time without pay.

(3) That the employee should not be dismissed or suspended.

The decision of the Commission on Professional Competence that the employee should not be dismissed or suspended shall not be based on nonsubstantive procedural errors committed by the school district or governing board unless the errors are prejudicial errors.

The commission shall not have the power to dispose of the charge of dismissal by imposing probation or other alternative sanctions. The imposition of suspension pursuant to paragraph (2) shall be available only in a suspension proceeding authorized pursuant to subdivision (b) of Section 44932 or Section 44933.

The decision of the Commission on Professional Competence shall be deemed to be the final decision of the governing board.

The board may adopt from time to time such rules and procedures not inconsistent with provisions of this section as may be necessary to effectuate this section.

The governing board and the employee shall have the right to be represented by counsel.

(d)(1) If the member selected by the governing board or the member selected by the employee is employed by any school district in this state the member shall, during any service on a Commission on Professional Competence, continue to receive salary, fringe benefits, accumulated sick leave, and other leaves and benefits from the district in which the member is employed, but shall receive no additional compensation or honorariums for service on the commission.

(2) If service on a Commission on Professional Competence occurs during summer recess or vacation periods, the member shall receive compensation proportionate to that received during the current or immediately preceding contract period from the member's employing district, whichever amount is greater.

(e) If the Commission on Professional Competence determines that the employee should be dismissed or suspended, the governing board and the employee shall share equally the expenses of the hearing, including the cost of the administrative law judge. The state shall pay any costs incurred under paragraph (2) of subdivision (d), the reasonable expenses, as determined by the administrative law judge, of the member selected by the governing board and the member selected by the employee, including, but not limited to payments or obligations incurred for travel, meals, and lodging, and the costs of the substitute or substitutes, if any, for the member selected by the governing board and the member selected by the employee. The Controller shall pay all claims submitted pursuant to this paragraph from the General Fund, and may prescribe reasonable rules, regulations, and forms for the submission of the claims. The employee and the governing board shall pay their own attorney fees.

If the Commission on Professional Competence determines that the employee should not be dismissed or suspended, the governing board shall pay the expenses of the hearing, including the cost of the administrative law judge, any costs incurred under paragraph (2) of subdivision (d), the reasonable expenses, as determined by the administrative law judge, of the member selected by the

governing board and the member selected by the employee, including, but not limited to, payments or obligations incurred for travel, meals, and lodging, the cost of the substitute or substitutes, if any, for the member selected by the governing board and the member selected by the employee.

As used in this section, "reasonable expenses" shall not be deemed "compensation" within the meaning of subdivision (d).

If either the governing board or the employee petitions a court of competent jurisdiction for review of the decision of the commission, the payment of expenses to members of the commission required by this subdivision shall not be stayed.

In the event that the decision of the commission is finally reversed or vacated by a court of competent jurisdiction, then either the state, having paid the commission members' expenses, shall be entitled to reimbursement from the governing board for those expenses, or the governing board, having paid the expenses, shall be entitled to reimbursement from the state.

Additionally, either the employee, having paid a portion of the expenses of the hearing, including the cost of the administrative law judge, shall be entitled to reimbursement from the governing board for the expenses, or the governing board, having paid its portion and the employee's portion of the expenses of the hearing, including the cost of the administrative law judge, shall be entitled to reimbursement from the employee for that portion of the expenses.

(f) The hearing provided for in this section shall be conducted in a place selected by agreement among the members of the commission. In the absence of agreement, the place shall be selected by the administrative law judge. [Italics added.]

* * *

**California Education Code § 44945.**

*The decision of the Commission on Professional Competence may, on petition of either the governing board or the employee, be reviewed by a court of competent jurisdiction* in the same manner as a decision made by a hearing officer under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. The court, on review, shall exercise its independent judgment on the evidence. The proceeding shall be set for hearing at the earliest possible date and shall take precedence over all other cases, except older matters of the same character and matters to which special precedence is given by law. [Italics added.]

* * *

**California Government Code § 6253.**

(a) *Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided.* Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.

(b) Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so. Computer data shall be provided in a form determined by the agency. . . . [Italics added.]

* * *

**California Government Code § 54954.2.**

(a) *At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session.* A brief general description of an item generally need not exceed 20 words. The agenda shall specify the time and location of the regular meeting and shall be posted in a location that is freely accessible to members of the public. . . . [Italics added.]

* * *

**California Government Code § 65960.1.**

(a) The district attorney *or any interested person may commence an action by mandamus or injunction for the purpose of obtaining a judicial determination* that an action taken by a legislative body of a local agency in violation

of Section 54953, 54954.2, 54954.5, 54954.6, or 54956 is null and void under this section. Nothing in this chapter shall be construed to prevent a legislative body from curing or correcting an action challenged pursuant to this section.

(b) *Prior to any action being commenced pursuant to subdivision (a), the district attorney or interested person shall make a demand of the legislative body to cure or correct the action alleged to have been taken in violation* of Section 54953, 54954.2, 54954.5, 54954.67, or 54956. The demand shall be in writing and clearly describe the challenged action of the legislative body and nature of the alleged violation. . . . [Italics added.]

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